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Court of Appeals No. 273946-III

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**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

**In Re the Dependency of D.R. and A.R.
State of Washington,**

Petitioner,

v.

T.R.,

Respondent.

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AMICUS CURIAE BRIEF OF THE MOCKINGBIRD SOCIETY

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TABLE OF CONTENTS

	Page
I. IDENTITY AND INTEREST OF AMICUS.....	1
II. INTRODUCTION	3
III. STATEMENT OF THE CASE.....	4
IV. ARGUMENT.....	4
A. Depriving Youth in Foster Care of a Trained Legal Advocate in Dependency and Termination Proceedings Harms Foster Youth and All Washingtonians.....	6
B. Racial Minorities Suffer Disproportionately Because of the Lack of Counsel.....	12
C. The Issues Before this Court are Certain to Recur and Should Be Decided Now.....	14
V. CONCLUSION.....	15

TABLE OF AUTHORITIES

	Page
Cases	
<i>Braam ex rel. Braam v. State</i> , 150 Wn.2d 689, 81 P.3d 851 (2003)	7, 10
<i>In re Dependency of A.K.</i> , 162 Wn.2d 632, 174 P.3d 11 (2007)	5
<i>In re Dependency of H.</i> , 71 Wn. App. 524, 859 P.2d 1258 (1993).....	5
<i>Kenny A. v. Perdue</i> , 356 F. Supp. 2d 1353 (N.D. Ga. May 19, 2009)	3
<i>Sorenson v. City of Bellingham</i> , 80 Wn.2d 547, 496 P.2d 512 (1972).....	5
<i>State v. Sansone</i> , 127 Wn. App. 630, 111 P.3d 1251 (2005).....	5
Statutes	
S. Rep. No. 104-107 (1995), reprinted in 1996 U.S.C.C.A.N. 3490	13
Treatises and Other International Agreements	
Convention on the Rights of the Child, G.A. Res. 44/25 Annex., U.N. Doc. A/44/736 (1989), reprinted in 28 Int'l Legal Materials 1456 (1985).....	9
Other Authorities	
A. Khoury, <i>Seen and Heard: Involving Children in Dependency Court</i> , 25 ABA Child Law Practice 10 (Dec. 2006).....	14
<i>Adoption and Foster Care Analysis and Reporting System (AFCARS)</i> , available at http://www.acf.dhhs.gov/programs/cb/stats_research/afcars/tar/report13.htm	11
Child Welfare League of America, <i>Child Abuse and Neglect: A Look at the States</i> (1999 CWLA Stat Book) 95	13
<i>Child Welfare League of America, Washington Foster Care Report Card</i> , available at	

TABLE OF AUTHORITIES
(continued)

	Page
<i>http://www.childwelfare.com/states/profiles/washington/fosterca rerc/6foster.htm</i>	13
Child Welfare League of America, Washington's Children 2005, available at http://www.childwelfare/washington.htm	7
Dorothy E. Roberts, <i>Is There Justice in Children's Rights? The Critique of Federal Family Preservation Policy</i> , 2 U. Pa. J. Const. L. 112 (1999)	13
E. Bartholet, <i>Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative</i> (Beacon Press 2000).....	14
Foster Care: What Young People in the System Say Is Working 3 (Jan. 2001), available at http://appreciativeinquiry.case.edu/uploads/Foster%20Care1.pdf	9
J. Jenkins, <i>Listen to Me! Empowering Youth and Courts through Increased Youth Participation in Dependency Hearings</i> , 46 Fam. Ct. Rev. 163 (Jan. 2008)	9
K. Mathis, <i>The American Bar Association Addresses the National Problem of Youth at Risk</i> , 45 Family Court Review 3 (July 2007)	14
M. Krinsky & J. Rodriguez, <i>Giving a Voice to the Voiceless: Enhancing Youth Participation in Court Proceedings</i> , 6 Nev. L.J. 1302 (2006).....	9
M. O'Hagan, <i>Foster Abuse Case Settled: \$11 Million for 8 Boys</i> , Seattle Times (July 10, 2008), available at <a href="http://seattletimes.nwsourc.com/html/localnews/2008043220_f
osterabuse10m.html">http://seattletimes.nwsourc.com/html/localnews/2008043220_f osterabuse10m.html	7
<i>Mockingbird Times</i> , available at <a href="http://www.mockingbirdsociety.org/march-2010-mockingbird-
times">http://www.mockingbirdsociety.org/march-2010-mockingbird- times	1
National Ass'n of Counties, <i>Youth Aging Out of Foster Care: Identifying Strategies and Best Practices</i> (Feb. 2008), available at http://www.dshs.wa.gov/pdf/ca/YouthAgingoutofFoster.pdf	11

TABLE OF AUTHORITIES
(continued)

	Page
<i>National Facts about Children in Foster Care</i> , available at http://www.fostercarealumni.org/resources/foster_care_facts_and_statistics.htm	11
Pew Commission on Children in Foster Care, <i>Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care</i> (2004), available at pewfostercare.org/research/docs/FinalReport.pdf	8
<i>Quantitative and Qualitative Data on Racial Disproportionality</i> (Nov. 2004), available at www.catalystforkids.org/KingCountyReportonRacialDisproportionality.pdf	13
Racial Disproportionality in the Child Welfare System in King County, Washington, <i>Report: Quantitative and Qualitative Data on Racial Disproportionality</i> (Nov. 2004) at 24, available at www.catalystforkids.org/KingCountyReportonRacialDisproportionality.pdf	13
W. Frederick & D. Sams, <i>A Child's Right to Counsel: First Star's National Report Card on Legal Representation for Children</i> (2d ed. 2009), available at http://www.journalismcenter.org/resource/health-and-safety/%E2%80%9C-childs-right-counsel-national-report-card-legal-representation-abused-a	3
Washington State Office of Civil Legal Aid, <i>Practices Relating to the Appointment of Counsel for Adolescents in Juvenile Court Dependency Proceedings in Washington State</i> (Dec. 2008)	6

I. IDENTITY AND INTEREST OF AMICUS

The Mockingbird Society ("Mockingbird") is a not-for-profit organization committed to promoting a world-class foster care system in Washington.¹ Founded in 2001, Mockingbird now serves the interests of thousands of children and youth involved in foster care. Mockingbird has developed active programs in every region of Washington and has become a major force for improving the level of support, resources, and care available to youth in foster care. In order to accomplish its objectives, Mockingbird has vigorously pursued a legislative reform agenda, the centerpiece of which focuses on the need to provide adequate legal representation to young people in foster care. This initiative is driven by Mockingbird's goal of ensuring that our most vulnerable youth have a voice in decisions that profoundly affect their lives, a goal that all of our programs seek to achieve.²

¹ Mockingbird's name was inspired by the 1962 classic novel, *To Kill a Mockingbird*, in which Atticus teaches his children that "Mockingbirds don't do one thing but make music for us to enjoy. They don't do one thing but sing their hearts out for us." The Mockingbird Society recognizes that foster youth have a voice, and it is our responsibility to ensure that they have the opportunity to use it.

² One example of Mockingbird's many programs designed to provide or promote opportunities for foster youth to use their voice is the monthly newspaper, *Mockingbird Times*. Foster youth from around the state author articles and poems, they make artwork and take photographs, and they edit the newspaper, all with the purpose of sharing their foster care experiences and offering advocacy suggestions from the perspective of those having lived within or been affected by the Washington foster care system. See, e.g., the March 2010 issue of the *Mockingbird Times*, available at <http://www.mockingbirdsociety.org/march-2010-mockingbird-times>, last visited March 8, 2010.

Mockingbird has long been at the forefront of efforts to ensure legal representation of youth in foster care. One of Mockingbird's most successful programs is the Mockingbird Network, a state-wide network of youth, aged 14-24, who are or have been in foster care. The young people are organized into six regional chapters that provide leadership training and enrichment activities. Each year, the various chapters work together to identify specific needs in the foster care system and develop a legislative reform agenda, which Mockingbird then carries forward to legislators and other key decision makers, including the Washington State Supreme Court Commission on Children in Foster Care. In recent years, the Mockingbird Network has identified and successfully advocated for legislative changes related to extension of Medicaid benefits, sealing juvenile records, and provision of safe housing. In spite of its many legislative successes, Mockingbird has so far been unable to achieve one of its key legislative objectives that youth across the state of Washington continue to speak out for: ensuring that youth in foster care are given a voice and legal representation in dependency and termination proceedings through the appointment of trained counsel.

Mockingbird submits this Amicus brief with the interest of ensuring that the experiences of D.R. and A.R., like so many other foster youth throughout the state, will not be repeated. Without definitive

guidance from this Court, Washington's foster youth will continue to be deprived of a voice when they need it the most.

II. INTRODUCTION

This case raises the question of whether Washington's children and youth in foster care have a constitutional right to be represented by counsel during dependency and termination proceedings. Without a trained legal advocate, foster youth frequently feel lost in confusing and complicated legal processes that fundamentally affect every aspect of their lives, including their family relationships and physical and psychological well-being. Mockingbird frequently observes the tragedy of these youth who become silenced, alienated and disengaged from the foster care process. A majority of the states have sought to encourage youth involvement in court proceedings and have legislatively created³ or judicially recognized⁴ a right of foster youth to legal representation. Washington, however, remains among a handful of states that leave the

³ According to First Start, a nonprofit organization that tracks legislation affecting at-risk youth, 35 states have passed legislation mandating legal representation of youth. See W. Frederick & D. Sams, *A Child's Right to Counsel: First Star's National Report Card on Legal Representation for Children* (2d ed. 2009), available at <http://www.journalismcenter.org/resource/health-and-safety/%E2%80%9C-childs-right-counsel-national-report-card-legal-representation-abused-a>, last visited March 8, 2010.

⁴ *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1359-60 (N.D. Ga. May 19, 2009) ("It is well settled that children are afforded protection under the Due Process Clauses of both the United States and Georgia Constitutions and are entitled to adequate procedural due process when their liberty or property rights are at stake. . . . The Court finds that children have fundamental liberty interests at stake in deprivation and [termination of parental rights] proceedings. These include a child's interest in his or her own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with his or her biological parents.").

appointment of counsel to the inconsistently applied discretion of trial court judges.

Although the question presented by this case may be a novel issue for this Court's consideration, it has been a focal point for The Mockingbird Society and the foster youth and alumni of Washington for many years. For the reasons explained more fully below, this Court should grant the petition for review and should decide the important constitutional issue that affects foster children throughout this state on a day-to-day basis and that is squarely before the Court.

If the State successfully prevents review of the constitutional issue merely by conceding error on other grounds, Mockingbird is concerned that the issue will forever evade review while vulnerable youth are deprived of critical services, system and case accountability, and a voice in their futures and families. The constitutional due process right to counsel must have a judicial remedy, which this Court should provide to Washington's foster children.

III. STATEMENT OF THE CASE

Amicus Mockingbird adopts Petitioners' statement of the case.

IV. ARGUMENT

This Court has long recognized that Washington's appellate courts may retain and decide "matters of continuing and substantial public

interest⁴ even though the underlying matter has been rendered moot. *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). If the rule were otherwise, fundamental rights would become mere abstractions. As this Court has noted, where rights cannot be protected through judicial remedies, they lose all value. *Id.* at 556. This important exception to the mootness doctrine, favoring resolution of issues of substantial public interest, has been frequently recognized and applied by Washington courts. *See, e.g., State v. Sansone*, 127 Wn. App. 630, 637, 111 P.3d 1251 (2005) (deciding due process claim in spite of State's concession of error because "[w]here a technically moot issue implicates due process rights, it is one in which there is sufficient public interest to warrant deciding it") (quoting *In re Dependency of H.*, 71 Wn. App. 524, 528, 859 P.2d 1258 (1993)).

There can be no question that the exception to the mootness doctrine applies where the rights and welfare of youth in foster care are at stake. This Court has already decided such rights should be addressed because "the public has a great interest in the care of children and the workings of the foster care system." *In re Dependency of A.K.*, 162 Wn.2d 632, 644, 174 P.3d 11 (2007).

The Mockingbird Society has for almost a decade observed how foster youth are negatively affected when they are deprived of a voice in

the legal process that will determine the course of their lives. It bears emphasizing that the State does not and cannot dispute that the right to legal representation of foster youth in dependency and termination proceedings is an issue of continuing and substantial public interest that merits this Court's review. The arguments below provide this Court with Mockingbird's experiences, which show why this issue is of great importance to the foster care system and to the State of Washington.

A. Depriving Youth in Foster Care of a Trained Legal Advocate in Dependency and Termination Proceedings Harms Foster Youth and All Washingtonians.

According to a 2008 report prepared by the Washington State Office of Civil Legal Aid, "outside of Benton, Franklin and King Counties, counsel is appointed for adolescents less than 50% of the time and probably far less frequently" in most counties.⁵ This widespread failure to appoint counsel to Washington's foster youth means that thousands of children are deprived of a voice in the dependency and termination process. By depriving youth of a voice in such an important process in their lives, Washington's foster care system perpetuates and exacerbates the feelings of abuse and neglect already suffered.

⁵ Washington State Office of Civil Legal Aid, *Practices Relating to the Appointment of Counsel for Adolescents in Juvenile Court Dependency Proceedings in Washington State* (Dec. 2008).

Most of the children and adolescents are in the foster care system because they have experienced serious abuse, neglect, abandonment, or some combination of these.⁶ Some of these youth are then exposed to further maltreatment or inadequate services and care while in Washington's foster care system.⁷ Because youth in foster care currently lack any recognized right in Washington to a trained attorney to speak on their behalf, they are deprived of a meaningful advocate for their stated interests. This fact highlights three problems that could be remedied by judicial recognition of the constitutional right to counsel.

First, youth in foster care often are or feel excluded from decisions that affect their family relationships, their physical safety, their health, and their home. In a 2004 report, the Pew Commission on Children in Foster Care made several broad, system-wide recommendations for ways to improve the foster care process to help children who have already suffered abuse or neglect.⁸ Among the report's key recommendations is that,

⁶ A number of organizations collect and publish data regarding the numbers of reported cases of abuse or neglect in Washington—and the number of these youth victims moved into the foster care system or other out-of-home care. *See, e.g.*, Child Welfare League of America, *Washington's Children 2005*, available at <http://www.childwelfare/washington.htm>, last visited March 8, 2010.

⁷ *See, e.g., Braam ex rel. Braam v. State*, 150 Wn.2d 689, 81 P.3d 851 (2003) (litigation brought for the purpose of improving the condition of foster youth); M. O'Hagan, *Foster Abuse Case Settled: \$11 Million for 8 Boys*, *Seattle Times* (July 10, 2008), available at http://seattletimes.nwsource.com/html/localnews/2008043220_fosterabuse10m.html, last visited March 9, 2010.

⁸ *See* Pew Commission on Children in Foster Care, *Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care* (2004), available at

because dependency determinations "have powerful and lifelong implications" for children," no child "should face the partial or permanent severance of familial ties without a fully informed voice in the legal process." *Id.* at 35.

It is not realistic, moral, or humane to allow our most abused and vulnerable children and adolescents to enter a courtroom without the appropriate level of expertise and confidentiality to represent them. As a citizenry, we do not accept this standard for our own children and should not allow a lesser legal or constitutional standard for children we know have been orphaned, battered, or neglected. It is developmentally inappropriate for any child or adolescent to be expected to understand, participate in, or psychologically manage the stress and complexity of courtroom proceedings. As one commentator has noted:

Youth report that attorneys and judges, due to the press of a busy day and a heavy caseload, too often rush through information, talk rapidly, and rely on jargon that is unfamiliar and confusing to non-lawyers, and is that much more incomprehensible to children. One youth opining on the court process requested that

pewfostercare.org/research/docs/FinalReport.pdf, last visited March 8, 2010. The Report states that the Commission was established "to develop recommendations to improve outcomes for children in the foster care system." *Id.* at 10. In order to accomplish that task, the Commission "listened to judges who oversee dependency cases, managers who administer child welfare systems, and caseworkers with daily, frontline responsibility for children," as well as "other professionals, scholars, and advocates; to foster, adoptive, and birth parents; and to young people themselves." *Id.*

the court, "stop talking in acronyms."
Another youth . . . poignantly recalled: "I
was confused, scared, and thought
everything was my fault."

M. Krinsky & J. Rodriguez, *Giving a Voice to the Voiceless: Enhancing Youth Participation in Court Proceedings*, 6 Nev. L.J. 1302, 1305-06 (2006)⁹; see also J. Jenkins, *Listen to Me! Empowering Youth and Courts through Increased Youth Participation in Dependency Hearings*, 46 Fam. Ct. Rev. 163 (Jan. 2008) (quoting 14-year-old Antoinette, who begged for a voice in her dependency process: "Listen to me, since no one else will, and try to understand where I'm coming from. Maybe I'm a child, but I'm not dumb.").

Because youth in foster care have been made to feel powerless by circumstances beyond their control and deprived of a voice in major decisions affecting every aspect of their lives, it is inhumane to perpetuate the impacts of trauma these youth have already suffered.¹⁰

⁹ In 2001, the Washington Office of the Family & Children's Ombudsman interviewed 32 foster children in order to get their evaluation of what is and is not working in the foster care system. The young people told interviewers that "success in foster care occurs when . . . they are able to influence what is happening to them." Foster Care: What Young People in the System Say Is Working 3, 16 (Jan. 2001), available at <http://appreciativeinquiry.case.edu/uploads/Foster%20Care1.pdf>, last visited March 8, 2010.

¹⁰ In fact, the United Nations has recognized the fundamental right of children to participate through a representative in "any judicial and administrative proceedings affecting the child." See Convention on the Rights of the Child, G.A. Res. 44/25 Annex., U.N. Doc. A/44/736 (1989), reprinted in 28 Int'l Legal Materials 1456 (1985). Washington's discretionary provision of counsel to foster youth in dependency and termination proceedings fails to satisfy basic standards long accepted as international norms.

Second, in addition to providing critical advocacy on behalf of the stated interests of the child, an attorney representing a foster youth will ensure more complete system accountability. A major component of any effective oversight process is ensuring that the agreed plans and services are executed and provided as agreed or as ordered by a court.¹¹

Mockingbird has observed countless children and adolescents who have failed to receive the services or resources ordered by courts, and, given the lack of advocacy for the children's stated interests, there were major delays before the services were provided or plans were implemented. This delay in system accountability often diminishes the opportunity for family visitation or reunification, adoption, or other permanency option.

Given the frequency of abuse or neglect within the foster home setting, the lack of system accountability also has safety implications. In some instances, the State fails to adequately respond to foster child complaints of abuse or neglect—because the child's story is not believed, because of a perception that the complaints are overstated, or for some other reason. An attorney, in whom a foster youth can communicate in

¹¹ As the *Braam* case amply illustrates, where foster youth are provided with the effective legal voice of trained counsel, they can pursue and achieve meaningful reforms on a case-wide and system-wide basis. 150 Wn.2d at 694 (noting that foster youth advocates across the nation began bringing litigation decades ago in an attempt to force states to improve their foster care systems"). Litigation initiated by children's advocates has resulted in more stable placements, improved mental health services, foster parent training and support, and a reduction in sibling separation, among other achievements. *Id.*

confidence, would be able to advocate for the expressed interests of the youth. Again, allowing foster youth to meaningfully participate in the process would likely encourage engagement in, rather than withdraw from, the process, and would prevent actions that might be (or might be perceived as) anti-social.

Third, foster youth frequently respond to a lack of system accountability by "opting out" of any genuine engagement in their lives. It is estimated that there are over 500,000 children and youth in foster care across the nation and between 10,000 and 14,000 in Washington.¹² The Foster Care Alumni of America estimates there are over 12 million alumni of foster care.¹³ The children and youth in foster care grow and eventually exit the foster care system to become adult members of the general community. It is in all of our best interest that these children and youth are well cared for and that they receive the support that will decrease the likelihood that large numbers of these youth will opt out and become unproductive members of society.¹⁴ While *some* youth receive a lay

¹² See *National Facts about Children in Foster Care*, available at http://www.fostercarealumni.org/resources/foster_care_facts_and_statistics.htm, last visited March 8, 2010; *Adoption and Foster Care Analysis and Reporting System (AFCARS)*, available at http://www.acf.dhhs.gov/programs/cb/stats_research/afcars/tar/report13.htm, last visited March 8, 2010.

¹³ *Id.*

¹⁴ See National Ass'n of Counties, *Youth Aging Out of Foster Care: Identifying Strategies and Best Practices* (Feb. 2008) (providing strategies aimed at improving conditions for

volunteer court appointed special advocate, representation by an attorney would help in ensuring that courts are aware that ordered services have or have not been delivered, would ensure that someone is advocating on a daily basis for the safety and well being of the foster youth, and would improve foster youth trust and engagement in the system. It is what our vulnerable foster youth are asking for, and it is what our foster kids need.

B. Racial Minorities Suffer Disproportionately Because of the Lack of Counsel.

Children of color are at a greater risk of being removed from their families and remaining in foster care. Because they are disproportionately represented in the foster care system, minority youth are also disproportionately affected by the lack of legal representation available to foster youth. Communities in Washington have an interest in remedying, rather than perpetuating, the disparate treatment of racial minorities by the legal system.

Mockingbird is a founding member of the King County Racial Disproportionality Coalition, which in 2004 issued its Report on Racial Disproportionality in the Child Welfare System. Unsurprisingly, the report found that Washington children of color—and particularly African-American and Native American children—are overrepresented in the

youth aging out of the foster care system), available at <http://www.dshs.wa.gov/pdf/ca/YouthAgingoutofFoster.pdf>, last visited March 9, 2010.

foster care system.¹⁵ The overrepresentation of minority youth in the foster care system has been well documented nationwide.¹⁶

The public has an interest in ensuring that its treatment of its vulnerable youth does not disproportionately disadvantage children of color. By depriving foster youth of legal representation, the state is refusing to provide the same level of support, resources, and care that children in healthy, intact families receive. Because of the racial disproportionality among foster youth, this means the state's current practice has the practical effect of unfairly targeting minority youth and subjecting them disparately to the harm that results from a lack of legal representation.

¹⁵ See Racial Disproportionality in the Child Welfare System in King County, Washington, *Report: Quantitative and Qualitative Data on Racial Disproportionality* (Nov. 2004) at 24, available at www.catalystforkids.org/KingCountyReportonRacialDisproportionality.pdf (noting that "[f]oster home parents are more likely to be Caucasian; children in foster care are more likely to be children of color"), last visited March 8, 2010; Child Welfare League of America, Washington Foster Care Report Card, available at <http://www.childwelfare.com/states/profiles/washington/fostercarerc/6foster.htm>, last visited March 8, 2010.

¹⁶ See S. Rep. No. 104-107, at 3 (1995), reprinted in 1996 U.S.C.C.A.N. 3490, 3492 (finding that "minority children enter the child protection system in disproportionately large numbers and are far more likely to remain in substitute care for long periods of time"); Child Welfare League of America, *Child Abuse and Neglect: A Look at the States* (1999 CWLA Stat Book) 95 (reporting that "African American and American Indian children are highly overrepresented in . . . out-of-home care"). As one commentator has noted, the overrepresentation of minority youth in the foster care system compounds other systemic disparities. See Dorothy E. Roberts, *Is There Justice in Children's Rights? The Critique of Federal Family Preservation Policy*, 2 U. Pa. J. Const. L. 112, 126 (1999) ("Once Black children enter foster care, they remain there longer, are removed more often, and receive less desirable placements than white children.").

C. The Issues Before this Court are Certain to Recur and Should Be Decided Now.

Children and adolescents in foster care and foster care alumni raise the issue of the right to counsel every year. The American Bar Association and other groups continue to identify the right to counsel as a critical issue.¹⁷ Our own foster children—through the *Mockingbird Times*, Mockingbird Networks, Foster Youth Alumni Services, and in testimony before this Court's Commission on Children in Foster Care and before the legislators in Olympia, have pleaded for the state to recognize their fundamental right to representation. Ensuring that children and youth in dependency proceedings have effective representation is a moral and legal obligation to ensure that foster children do not remain in abusive and neglectful homes—or even, in some circumstances, succumb to homelessness, poverty, or other social ills for lack of support, services, and accountability from our Court systems.

Commonly referred to as "nobody's children,"¹⁸ foster youth often end up with no voice, no advocate, and caught in a tug-of-war battle in Washington courtrooms. Mockingbird believes that the status quo

¹⁷ See, e.g., K. Mathis, *The American Bar Association Addresses the National Problem of Youth at Risk*, 45 Family Court Review 3, 354-60 (July 2007) (listing as a key ABA initiative a program to ensure "youth voices in court" and to provide "resources to facilitate communication and encourage their presence"); A. Khoury, *Seen and Heard: Involving Children in Dependency Court*, 25 ABA Child Law Practice 10 (Dec. 2006).

¹⁸ See E. Bartholet, *Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative* (Beacon Press 2000).

deprivation of any meaningful participation in dependency proceedings is legally and morally inadequate. The resulting problems will continue to arise in Washington and across the nation because of the sheer growing numbers of dependency and termination proceedings constantly under way. Youth in care have testified, and Mockingbird believes and continues to advocate, that the simple act of providing an attorney to children in care can be one of the most useful tools in helping Washington State build a world-class foster care system and in safeguarding the rights and well being of our most vulnerable children.

V. CONCLUSION

This Court should hold that Washington appellate courts have the broad authority and discretion under the Rules of Appellate Procedure and case law to decide an issue that is unquestionably one of substantial public interest. In exercising that discretion, this Court should hold that Washington youth in foster care have a due process right to have their stated interests represented by counsel in the foster care dependency and termination process.

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